

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 24.

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

ETHEL PAINTER, ADMINISTRATRIX OF THE ESTATE OF
GEOFFREY L. PAINTER, DECEASED, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

H. O'B. COOPER,
RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
ERVIN C. HARTMAN,
SIDNEY S. ALDERMAN,
Attorneys for Petitioner,
Southern Railway Company.

S. R. PRINCE,
Of Counsel.

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BRIEF FOR PETITIONER.

OPINION BELOW.

The Trial Judge in the District Court below filed no opinion. He made findings of fact and stated conclusions of law which followed the allegations of respondent's supplemental equitable complaint. (R. 42-49.) The opinion below, of the Circuit Court of Appeals for the Eighth Circuit, is reported in 117 F. (2d) 100-108. It appears in the record, pages 78 to 94.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 10, 1941. (R. 94.) Petition for writ of certiorari was filed in this court on February 4, 1941 (R. cover), and certiorari was granted on May 26, 1941, 312 U. S. (Adv. No. 3) v.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347.

QUESTIONS PRESENTED.

1. Whether the Chancery Court of Knox County, Tennessee, having jurisdiction of the person of respondent, had the right, power, authority and jurisdiction, in an equity suit brought by petitioner, to enjoin respondent, a resident of Knox County, Tennessee, and acting as administratrix by appointment of the Knox County Probate Court, from prosecuting in the District Court of the United States for the Eastern District of Missouri an action at law to recover damages under the Federal Employers' Liability Act for the death of her deceased husband, the fatal accident having happened in North Carolina, and both the respondent and her intestate being residents of Knox County, Tennessee.

2. Whether the decree of the Chancery Court of Knox County, Tennessee, is binding upon respondent, both individually and in her representative capacity, until set aside or reversed; and whether the District Court was required to give full faith and credit to such decree under Article IV, Sec. 1, of the Constitution of the United States, and under 1 Stat. 122 as amended, 28 U. S. C. 687.

3. Whether the District Court, on a supplemental equitable complaint filed in an action at law there under the Federal Employers' Liability Act, had the right, power, authority and jurisdiction to issue an injunction against petitioner, restraining and enjoining it from prosecuting or

maintaining its chancery suit in Knox County, Tennessee, and ordering and directing petitioner to dismiss its said chancery suit.

4. Whether Section 265 of the Judicial Code (28 U. S. C. 379) deprived the District Court of the right, power, authority and jurisdiction to issue its interlocutory injunction.

5. Whether the Tennessee decree actually and legally enjoined proceedings in the federal court, or whether it was a mere personal decree against respondent, issued by the Tennessee court against one of its own citizens, restraining her personally from doing an inequitable, oppressive and harassing act.

STATUTES INVOLVED.

Two federal statutes are involved:

First: The Federal Employers' Liability Act, 35 Stat. 65-66, 45 U. S. C. 51-59, as amended by the Act of August 11, 1939, 53 Stat. 1494, and particularly the jurisdictional and venue section thereof, 45 U. S. C. 56, which provides:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Second: Section 265 of the Judicial Code, 28 U. S. C. 379, which provides:

“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

STATEMENT.

The case is here on certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, which affirmed an injunctional order issued by the District Court of the United States for the Eastern District of Missouri (on a supplemental equitable complaint filed by respondent in an action there pending by her against petitioner under the Federal Employers' Liability Act), restraining petitioner from enforcing against respondent an injunction issued at petitioner's instance by the Chancery Court of Knox County, Tennessee (from which state court injunction respondent did not appeal), and mandatorily commanding petitioner to dismiss and set at naught its suit in the Tennessee court.

On August 31, 1939, respondent, a resident of Knox County, Tennessee, and administratrix of her deceased husband's estate by appointment of the Probate Court of that County and State, filed an action at law against petitioner, in the United States District Court for the Eastern District of Missouri, Eastern Division, to recover damages under the Federal Employers' Liability Act (35 Stat. 65-66, 45 U. S. C. 51-59) for the alleged wrongful death of her intestate on February 3, 1939, near Paint Rock, Madison County, North Carolina, while he was employed by petitioner as a fireman on an interstate train operated between points in Tennessee and North Carolina. (R. 2, 3.)

To an amended complaint filed on March 8, 1940 (R. 7), petitioner answered (R. 10), raising issues as to negligence, contributory negligence and assumption of risk.

Thereafter, on May 27, 1940, the Chancery Court of Knox County, Tennessee, in a suit brought by petitioner against respondent (R. 26), having therein jurisdiction of

the person of respondent, both individually and in her representative capacity, by personal service of process upon her (R. 19), enjoined respondent under the laws of Tennessee, individually and as a Tennessee administratrix, from further prosecuting and maintaining her said action against petitioner in the United States District Court for the Eastern District of Missouri, and from instituting any other suit on her alleged cause of action, except in the State courts of either Knox County, Tennessee, or Madison County, North Carolina, or in the United States District Courts for either the Eastern District of Tennessee at Knoxville or the Western District of North Carolina at Asheville. (R. 33.)

The Tennessee court based its injunction on general grounds of equity: that for respondent, a resident and probate court appointee of Tennessee, to avoid bringing her Liability Act suit in either the state or federal courts in Tennessee, the state of residence, or in either the state or federal courts of North Carolina, where the cause of action arose, but to export her cause of action to the distant jurisdiction of Missouri and there to sue petitioner in the federal district court, when all the witnesses live in western North Carolina or eastern Tennessee, would be inequitable, harassing and oppressive, and would work an unjust and inequitable hardship on petitioner. (R. 26-36.)

Respondent did not appeal from the injunction issued by the Tennessee court. Instead, she filed, on June 21, 1940, in her action at law pending in the United States District Court for the Eastern District of Missouri, a supplemental equitable complaint, setting out the proceedings had and the judgment rendered against her in the equity suit in the Tennessee court, and thereupon moved for a temporary injunction against petitioner. (R. 14-37.)

On July 10, 1940, upon hearing solely upon respondent's sworn supplemental complaint and motion for temporary injunction, the District Court of the United States for the Eastern District of Missouri, Eastern Division, issued what it designated as a "Writ of Preliminary Injunction," but

which, without limitation of time, broadly enjoined petitioner from interfering in any way with the liberty of respondent in prosecuting her said action in that court, from interfering in any way with that court's jurisdiction in the case, from further prosecuting petitioner's equity suit in the Chancery Court of Knox County, Tennessee, and from taking any except dismissal proceedings therein. (R. 51-54, 73-76.)

This injunction order went even further and mandatorily and unconditionally commanded and directed petitioner forthwith to dismiss and set at naught its suit in the Tennessee court. (R. 53, 75.) In its terms and in effect, this part of the injunction was final, not preliminary or interlocutory.

From that order petitioner appealed, with supersedeas, under Section 129 of the Judicial Code as amended, 28 U. S. C. 227, to the United States Circuit Court of Appeals for the Eighth Circuit. (R. 1, 55.)

On January 10, 1941, that court affirmed the decree of injunction issued by the District Court. (R. 94.) In its opinion, the court recognized that it was dealing with important questions of conflict between state and federal courts and that its decision was squarely in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in a case on closely similar facts, *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569. (R. 91.)

The Circuit Court of Appeals below held that the Tennessee court was without right, power, authority or jurisdiction to enjoin respondent from prosecuting suit for damages in the United States District Court for the Eastern District of Missouri; that the decree of the Tennessee court was not binding on respondent, and that federal courts are not required by the Constitution of the United States to give full faith and credit to such a decree; that the District Court had the right, power, authority and jurisdiction to issue its injunction restraining and enjoining petitioner from prosecuting or maintaining its chancery suit in Knox County,

Tennessee, and directing petitioner to dismiss that suit; that the District Court was not deprived of power and jurisdiction to issue its injunction by Section 265 of the Judicial Code (28 U. S. C. 379), which expressly prohibits federal courts from enjoining proceedings in state courts, except in bankruptcy matters; and that the decree of the Tennessee court was not merely a personal decree against respondent, restraining her personally from doing an inequitable, oppressive and harassing act, but that the decree actually and legally interfered with and enjoined proceedings in the federal court.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In affirming and not reversing the decree of the District Court.

2. In not holding and finding that the District Court was wholly without jurisdiction to issue the preliminary injunction.

3. In affirming the order of the District Court that petitioner be restrained from interfering in any way with the liberty of respondent in carrying on, prosecuting and maintaining her cause of action in the District Court under the Federal Employers' Liability Act.

4. In affirming the order of the District Court restraining petitioner from further prosecuting and maintaining its equity suit against respondent in the Chancery Court of Knox County, Tennessee, and from taking any other than dismissal proceedings therein.

5. In affirming the order of the District Court directing petitioner forthwith to dismiss its said suit in said Chancery Court of Tennessee.

6. In affirming the District Court's assumption of control over the personal acts of respondent, a Tennessee adminis-

tratrix, contrary to the decree of the said Chancery Court of Tennessee.

7. In holding and finding that the judgment and order of the Chancery Court of Tennessee, restraining respondent, was of no force and effect.

8. In not holding and finding that the Chancery Court of Tennessee had jurisdiction of the parties and of the subject matter and cause of action before it, and that its decree enjoining respondent was and is a valid, subsisting and binding decree and judgment, not subject to collateral attack in the District Court below; and in affirming the order of the District Court that petitioner be restrained from carrying the said decree of said Chancery Court of Tennessee into full force and effect.

9. In not holding and finding that the rights, powers and privileges, duties and obligations of respondent, as administratrix, were created and are controlled by the laws of Tennessee, and in affirming the District Court's jurisdiction and control over respondent contrary to the decree and order of said Chancery Court of Tennessee.

10. In failing to give full faith and credit to the judicial proceedings of the State of Tennessee in the said cause pending in said Chancery Court. (Article IV, Section 1, Constitution of the United States; 1 Stat. 122, as amended, 28 U. S. C. 687.)

11. In not holding and finding that, in the absence of an appeal, the judgment and decree of said Chancery Court of Tennessee was a final determination and *res judicata* of the issues there involved, and was a complete bar to the injunction sought by respondent in the District Court.

12. In not holding and finding that the District Court was without power, jurisdiction or right to grant the preliminary injunction against petitioner, by reason of Section 265 of the Judicial Code.

13. In holding that the jurisdiction and venue provision of the Federal Employers' Liability Act, 45 U. S. C. 56, deprived the Chancery Court of Knox County, Tennessee, of all power or jurisdiction to enjoin respondent from prosecuting her action in the District Court below, so that the judgment of said Tennessee Court was null and void, could be collaterally attacked in the District Court, and was not there entitled to full faith and credit.

14. In holding that Section 265 of the Judicial Code did not deprive the District Court of jurisdiction and power to enjoin petitioner from taking further proceedings in its suit against respondent in the said Chancery Court of Tennessee except dismissal proceedings and to order petitioner forthwith to dismiss and set at naught its said suit in said State court.

15. In holding that the District Court had jurisdiction and power to issue the preliminary injunction against petitioner in spite of Section 265 of the Judicial Code.

REFERENCE TO COGNATE CASE.

On February 10, 1941, this Court granted certiorari in a cognate case, No. 678, *Baltimore & Ohio R. R. Co. v. Kepner*, to review a decision of the Supreme Court of Ohio in which that court held that the courts of Ohio were, by reason of the jurisdictional and venue provision of the Federal Employers' Liability Act, without power to enjoin Kepner, a resident of Ohio, from prosecuting in the District Court of the United States for the Eastern District of New York a prior action brought by him under the Liability Act to recover damages for his personal injuries sustained in Ohio, against the Baltimore & Ohio, which was doing business in that district in New York.

On April 14, 1941, this Court affirmed the judgment in the *Kepner Case*, *supra*, by an equally divided court, without opinion, 312 U. S. (Adv. No. 1) ii. But on April 28, 1941, it granted petition for rehearing and vacated its judg-

ment in that case, as in four other cases, and restored the *Kepner Case* to the docket for reargument and hearing on October 13, 1941, 312 U. S. (Adv. No. 2) v.

In granting certiorari in the present case this Court assigned the present case for argument immediately following No. 678, *Baltimore & Ohio R. R. Co. v. Kepner*, as we were advised by the Clerk.

The *Kepner Case* did not involve a death action under the Liability Act. Kepner in his action in the federal district court in New York was suing as an individual, in his own right, to recover damages for his own personal injuries. He needed no authority from Ohio, the state of his residence, to create the status in which he sued. Respondent in our case is suing in the federal district court in Missouri solely in her representative capacity, as a Tennessee administratrix, to recover damages for the alleged wrongful death of her intestate. Her very status as such administratrix was created by appointment by the probate court in Tennessee. She remains subject to the authority of Tennessee courts in the administration of her office. A stronger case is presented for the power of the courts of the state of her residence, appointment and function to enjoin her from suing in a distant and foreign jurisdiction, than in the case of an individual resident suing in a foreign jurisdiction in his individual capacity and pursuant to no state office.

Again, in the *Kepner Case* the state court denied injunction, conceiving that it was without power to grant it. There was no collateral attack on its judgment but a direct review on appeal. No question of collateral attack on the judgment, of denial of full faith and credit, or of injunction by the federal court to restrain proceedings in the state court in violation of Section 265 of the Judicial Code arises in that case. All those questions arise in our case.

ARGUMENT.

I.

The Conflicting Principles Which Must be Reconciled to Extract the True Rule to Govern This Case.

The true rule to govern the case at bar must be spelled out by a balancing and reconciliation of a number of conflicting principles which stem inevitably from our dual system of sovereignties and courts, under which state and federal courts sit in the same physical areas but on different legal planes, with power and jurisdiction coming from different sources, sometimes with concurrent and coordinate jurisdiction over the same persons, issues and controversies, mutually independent each of the other, yet both subject to necessary rules of comity to avoid unseemly conflicts inconsistent with our peculiar, dual constitutional system.

We have the fundamental principle that an administratrix is a state officer, deriving her authority solely from state appointment, and wholly subject to the laws of her state and to the control of its courts in the administration of her office, in conflict with ^{the} fact that Congress has created a cause of action for wrongful death which did not exist at common law, has vested that cause of action in the state officer, and in express terms has given jurisdiction and venue of such cause of action to the federal district court in the distant foreign state in which petitioner railroad is doing business, concurrently with the same jurisdiction and venue in the district court in the district of the residence of petitioner and the district court in the district in which the cause of action arose, and concurrently with jurisdiction in the courts of the several states.

We have the principle of Section 265 of the Judicial Code, that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy" (*Diggs v. Wolcott*, 4 Cranch. 179; *Watson v. Jones*, 13

Wall, 679; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340; *Hall v. Barr*, 234 U. S. 712; *Essauay Edm Co. v. Kane*, 258 U. S. 358; *Hill v. Martin*, 296 U. S. 393, 403; *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4, 8-9; *Kohn v. Central Distributing Co.*, 306 U. S. 531; *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 274, decided February 3, 1941) in conflict with a rule of comity whereby state courts, subject to important exceptions and limitations, ought not to interfere with proceedings in the United States courts where the latter have jurisdiction. (*Peck v. Jenness*, 7 How. 612; *Moran v. Sturges*, 154 U. S. 256; *Oklahoma v. Texas*, 265 U. S. 490; Compare *Kline v. Burke Construction Co.*, 260 U. S. 226; *Richle v. Margolies*, 279 U. S. 218; *Penn Co. v. Pennsylvania*, 294 U. S. 189; *Princess Lida v. Thompson*, 305 U. S. 456; *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4; *Steelman v. All Continent Corp.*, 301 U. S. 278.)

We have the general principle that the first of two coordinate courts to acquire jurisdiction can protect itself in the exercise of that jurisdiction against interference by proceedings in the other court which would defeat or impair the effectiveness of the first court's jurisdiction (*French v. Hay*, 22 Wall. 250; *Dietsch v. Huidkoper*, 103 U. S. 494, 497; *Moran v. Sturges*, 154 U. S. 256; *Julian v. Central Trust Co.*, 193 U. S. 93, 112; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 245; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 184) in conflict with the important, but not always clearly defined, exception to or limitation upon that principle, which makes the principle apply only where there is conflict *in rem* or *quasi in rem* and not where the conflict is only *in personam*. (*Kline v. Burke Construction Co.*, 260 U. S. 226; *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 88; *Richle v. Margolies*, 279 U. S. 218; *Penn Co. v. Pennsylvania*, 294 U. S. 189, 195; *Princess Lida v. Thompson*, 305 U. S. 456, 465.)

We have the modern doctrine of *Eric R. Co. v. Tompkins*, 304 U. S. 64, whereby questions of general, unwritten law or equity, not covered by the Constitution, treaties or statutes of the United States, are remitted wholly to the states, with decisions of the state courts binding on all federal courts, in conflict with a contention that the jurisdiction and venue provision of the Federal Employers' Liability Act, enacted long before *Eric R. Co. v. Tompkins* was decided and when the doctrine of *Swift v. Tyson*, 16 Pet. 1, was understood to be the law, impliedly takes away from courts of the state of appointment and residence of a personal representative the power, which such courts would otherwise have, to restrain the personal representative from an inequitable resort to the courts of a distant, foreign jurisdiction, although the Liability Act does not in terms purport to deprive the state courts of that power.

We have the doctrine that federal courts must give full faith and credit to the unreversed judgments of the courts of the states (Article IV, Sec. 1, of the Constitution; 1 Stat. 122, as amended, 28 U. S. C. 687) and will not entertain collateral attacks thereon, see *Wagner Co. v. Lyndon*, 262 U. S. 226, except in the case of fraud, *Marshall v. Holmes*, 141 U. S. 589, or want of jurisdiction, *Simon v. Southern Ry. Co.*, 236 U. S. 115; *Pennoyer v. Neff*, 95 U. S. 714, standing in conflict with a principle sometimes declared that a federal court will entertain such a collateral attack and will deprive a party by means of an injunction of the benefit of a state court judgment, even though it may be valid at law, "where its enforcement will be contrary to recognized principles of equity and the standards of good conscience," *Wells Fargo & Co. v. Taylor*, 254 U. S. 175.

Whether the basic holding in *Wells Fargo & Co. v. Taylor*, *supra*, was sound may well be doubted in the light of more recent decisions. Cf. *Essanay Film Co. v. Kane*, 258 U. S. 358; *Wagner Co. v. Lyndon*, 262 U. S. 226; *Richle v. Marquies*, 279 U. S. 218, 223; *Hill v. Martin*, 296 U. S. 393, 403; *Eric R. Co. v. Tompkins*, 304 U. S. 64; *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4, 8-9.

The difficulty of reconciling the conflicting principles which collide in this case is sharply illustrated by the diametrical conflict in conclusions reached on the same issues and questions by two such able courts as the Court of Appeals for the Eighth Circuit in the decision below (R. 78-94) and the Court of Appeals for the Second Circuit in *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569.

II.

The Chancery Court of Tennessee Had the Power to Restrain Respondent, a Tennessee Administratrix, on Equitable Grounds, from Exercising Her Legal Right to Sue Under the Liability Act in the Distant Federal District Court in Missouri, Unless That Power is Taken Away (1) By the Jurisdictional and Venue Provision of the Liability Act or (2) By the Rule of Comity Whereby, Under Some Circumstances, the First Court to Acquire Jurisdiction Can Protect Its Jurisdiction by Injunction to Prevent Conflicting Proceedings in the Court of Coordinate Jurisdiction.

The general and inherent power of courts of equity to enjoin residents within their jurisdiction from prosecuting actions at law in foreign jurisdictions under harassing, vexatious or inequitable circumstances cannot be doubted.

In *High on Injunctions*, 4th ed., secs. 103-105, the author states the English rule whereby the English Chancery Court, although it will not undertake directly to interfere with process or proceedings of foreign tribunals, will, when parties to a foreign suit are within the English jurisdiction, restrain them by injunction *in personam* from proceeding further in the foreign court in a manner contrary to equity and good conscience. A clear distinction is drawn between interference with the foreign court as such and *in personam* restraint against the parties. Then in section 106 the author states the American rule as follows:

“While in this country the aid of equity is rarely if ever invoked to restrain proceedings in the courts of

foreign nations, yet the same principles are held applicable to the case of enjoining citizens of one state from proceedings at law in the courts of a sister state. And while there is a lack of uniformity, amounting even to a conflict of authority, in the decided cases, the English rule seems to have the support of the clear weight of authority; and the courts of one state will, in a proper case, enjoin persons within their jurisdiction from instituting legal proceedings in other states, or from further proceedings in actions already begun. (Citing many cases.) As we have seen in a preceding section, a distinction is drawn between a court of equity interfering with the action of the courts of a foreign state, and restraining persons within its own jurisdiction from using foreign tribunals as instruments of wrong and oppression. While, therefore, the court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting or carrying on suits in other states which will result in injury and fraud." (Citing many cases.)

Among the leading cases cited by the above author are *Cole v. Cunningham*, 133 U. S. 107, and *Dchon v. Foster*, 4 Allen (Mass.) 545. In *Cole v. Cunningham* this Court approved *Dchon v. Foster* as the leading case on the subject, held that the Massachusetts equity court could competently restrain citizens of that state from further prosecuting attachment suits in New York, and, after full discussion of authorities, said (133 U. S. at 124):

"*Dchon v. Foster*, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, Ch. J., points out that the jurisdiction of a court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon a proper case made, either in the courts of Massachusetts or in other states or foreign countries, rests on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and

that, as the decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

Cole v. Cunningham has been cited and followed by this Court in many cases down to and including *Steelman v. All Continent Corp.*, 301 U. S. 278, 291.

The law of Tennessee is to the same effect. *Louisville & N. R. Co. v. Ragan*, 172 Tenn. 593, 113 S. W. (2d) 743.

See also to the same effect: 14 Ruling Case Law, secs. 112, 113-114, pp. 411-414; Roberts' Federal Liabilities of Carriers, 2d ed., Vol. 2, Sec. 962; *Ex parte Crandall* (C. C. A. 7th), 53 F. (2d) 969, certiorari denied 285 U. S. 540; *Bryant v. Atlantic Coast Line R. Co.* (C. C. A. 2nd), 92 F. (2d) 569; *Reed's Adm'r. v. Illinois Central R. Co.*, 182 Ky. 455, 206 S. W. 794; *Chicago, M. etc. R. Co. v. McGinley*, 175 Wis. 565, 185 N. W. 218; *N. Y. C. & St. L. R. Co. v. Matzinger*, 136 Ohio State 271, 25 N. E. (2d) 349; *N. Y. C. & St. L. R. Co. v. Norton*, 331 Mo. 764, 55 S. W. (2d) 272; *In re Spoo's Estate*, 191 Iowa 1134, 183 N. W. 580.

And in *Davis v. Farmers Co-operative Co.*, 262 U. S. 312, 315-316, this Court took judicial notice of the hardship upon carriers of the exportation of damage suits to distant jurisdictions, which was the equity basis of the Tennessee injunction against respondent in our case. This Court there said, Mr. Justice Brandeis writing the opinion:

"That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed spe-

cifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

The holding in *Davis v. Farmers Co-operative Co.*, *supra*, has been frequently reaffirmed. *Atchison & S. F. Ry. Co. v. Wells*, 265 U. S. 101, 103; *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 373; *Michigan Central v. Mix*, 278 U. S. 492, 494-495; *Denver & R. G. W. R. Co. v. Terte*, 284 U. S. 284, 287.

It would seem that the rule in favor of the power of the equity courts of a state to restrain its citizens on equitable grounds against maintaining suits at law in distant foreign jurisdictions must necessarily apply *a fortiori* where the person restrained is not merely a resident of the state but is a state officer, a personal representative, appointed by and accountable to the courts of the state of residence for her official acts. Such is our case. Respondent is suing in the liability action in the federal district court in Missouri not in her personal right, as to which she might conceivably be more free in exportation of transient causes of action to distant jurisdictions, but solely in her representative capacity as a Tennessee administratrix.

To hold, as the court below held, that the courts of Tennessee are utterly without power to control or restrain her official conduct in refusing to bring her suit in either the state or federal courts of Tennessee or of North Carolina, the state where the accident occurred, all of which courts were and are left open and readily available to her, and in exporting her suit to the distant jurisdiction of the federal court in Missouri, is to take away from the state a very im-

portant power to govern the official conduct of a purely state officer. It is certainly contrary to the spirit, if not to the letter, of the doctrine of *Eric R. Co. v. Tompkins*, 304 U. S. 64.

Such a holding ought not to be sustained unless the Federal Employers' Liability Act very clearly and unmistakably evidences the intention of Congress to take away that vital and ordinary power of the state. We shall see in the next point that it does not.

Personal representatives appointed under state laws are so peculiarly and wholly subject to the control of the courts of the state of appointment that it is generally held that they are without power to sue in any courts except those to which the power of their letters extend. *Dixon v. Ramsay*, 3 Cranch 319; *Doe ex dem. Lewis v. M'Farland*, 9 Cranch 151.

And it is the thoroughly settled general rule that a grant of administration has no operation outside the state in which it is made and that an executor or administrator cannot sue or be sued in his official capacity in the courts of any other country or state than that from which he derives his authority. *Fenwick v. Sears*, 1 Cranch 259; *Dixon v. Ramsey*, 3 Cranch 319; *Doe ex dem. Lewis v. McFarland*, 9 Cranch 151; *Kerr v. Moon*, 9 Wheat. 565; *Smith v. Union Bank*, 5 Pet. 518; *Kane v. Paul*, 14 Pet. 33; *Vaughn v. Northrup*, 15 Pet. 1; *Noonan v. Bradley*, 9 Wall. 394; *Noonan v. Bradley*, 12 Wall. 121; *Union Mut. L. Ins. Co. v. Lewis*, 97 U. S. 682; *Dennick v. Central R. Co.*, 103 U. S. 11; *Wilkins v. Ellett*, 108 U. S. 256; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138; *Johnson v. Powers*, 139 U. S. 156; *Lawrence v. Nelson*, 143 U. S. 215; 21 Am. Jur., pp. 925-927, see, 981, and pp. 929-930, see, 985.

Under the law of Tennessee a cause of action for wrongful death is an "asset" of the estate of the decedent and is the basis upon which an administrator may be appointed. *Sharp v. C., N. O. & T. P. R. Co.*, 133 Tenn. 1, 9, 179 S. W. 375.

And under the law of that State the existence of property or assets of the deceased within the State, together with the deceased's residence in the State at the time of his death, is the jurisdictional fact which gives jurisdiction to the probate courts of Tennessee to appoint a personal representative. *Woodfin v. Union Planters Nat. Bank & Trust Co.*, 174 Tenn. 367, 125 S. W. (2d) 487.

And, under Tennessee law, sureties on administrators' bonds are not liable for assets brought into Tennessee from another state. *Keaton v. Campbell*, 21 Tenn. 224; *Powers v. Lowe*, 54 Tenn. 84; *Snodgrass v. Snodgrass*, 60 Tenn. 157; *Little v. Cook*, 78 Tenn. 715.

From this it follows that the courts of Tennessee must have the power to control the forum in which the Tennessee administrator is to sue to recover damages for the wrongful death and to require that such suit be brought in Tennessee (in either state or federal courts) else the other beneficiaries will have no protection on the administrator's bond. He may sue in another state, recover and collect there, and there squander or misappropriate the recovery and the other beneficiaries in Tennessee be left without remedy.

Although a recovery in a death action under the Federal Employers' Liability Act is not for the benefit of the personal representative, as such, or even for the benefit of the estate, as such, but is for the benefit of the particular beneficiaries named in the Liability Act, on whose behalf the personal representative acts only as the trustee of an express trust, *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, yet it is only the "personal representative" under state law who can maintain the cause of action for these beneficiaries, *Pecos v. Rosenbloom*, 240 U. S. 439; *St. Louis, S. F. & T. R. Co. v. Scale*, 229 U. S. 156; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702; *Missouri, K. & T. Co. v. Wolf*, 226 U. S. 570; *American R. Co. of Porto Rico v. Birch*, *supra*.

And the federal statutes provide no machinery or jurisdiction for the appointment and control of the personal representative and this function remains one for state control.

In our case the decedent left children as beneficiaries in addition to the widow-administratrix (R. 27). Further, it was alleged and not denied in the Tennessee injunction suit (R. 29) that the decedent's estate was insolvent and that shortly prior to his death the decedent had filed petition in bankruptcy in the United States District Court at Knoxville, Tennessee, and that the bankruptcy proceeding was pending at the date of his death.

Thus, if he had not died, the federal district court in Tennessee would have administered his insolvent estate in bankruptcy. His death left as the only surviving asset a cause of action for wrongful death, which, since he was killed in interstate transportation employment, was a cause of action under the Federal Employers' Liability Act rather than under the Tennessee Lord Campbell's Act statute and which was technically an asset of the beneficiaries named in the Liability Act rather than of the estate as such.

But the sole basis under Tennessee law for the appointment of respondent as administratrix was the existence *in Tennessee* of this cause of action. The courts of Tennessee and the federal district court in Tennessee were and still remain wide open to her to prosecute her cause of action and to recover the asset. Petitioner is in Tennessee and readily subject to suit there. Yet if respondent refuses to recover the asset within the state of her appointment but goes to another state and recovers it there her co-beneficiaries are without protection under Tennessee law.

Under these circumstances it seems to be an utter anomaly for her to be suing as a Tennessee administratrix, to recover the sole asset she was appointed to recover, in the federal district court in Missouri, merely because petitioner, although operating no lines of railroad in that State (R. 28), runs trains interstate from East St. Louis, Illinois, across the river into St. Louis, Missouri.

We doubt if the anomaly of this situation occurred to Congress when it enacted and amended the jurisdiction and venue provision of the Liability Act. We think it probably

had its attention centered, in drafting that provision, on protecting the right of injured persons, suing in their individual right for damages for their own injuries, persons not tied to any one state by office or appointment, to sue in any district in which the carrier is doing business.

We doubt if Congress realized that the same provision, covering both personal injury suits and death actions, purported to authorize a state administrator to export a cause of action existing in the state of appointment, as the sole basis of appointment, into a distant state, contrary to the settled, general rule against foreign suits by administrators, and there to recover outside the jurisdiction of the state of appointment and with the possibility of wasting or misappropriating the recovery in the foreign jurisdiction and leaving the other beneficiaries in the state of appointment without remedy.

However this may be, it follows from what has been shown before, that the chancery court of Tennessee clearly had the power to enjoin respondent from exporting her cause of action to Missouri, unless the jurisdiction and venue provision of the Liability Act or the rule of comity, or the two together, have taken away that power.

III.

Neither the Federal Employers' Liability Act Nor the Rule of Comity Whereby the First of Two Courts of Concurrent Jurisdiction to Acquire Jurisdiction May, in Some Cases, Protect Its Jurisdiction, Takes Away From the Tennessee Court the Power to Enjoin Respondent From Exporting Her Cause of Action and, Conversely, Section 265 of the Judicial Code Deprives the District Court in Missouri of the Power to Enjoin the Proceedings in the Tennessee Court.

1. The reasoning holding of the court below.

The court below based its decision squarely on the provision of Section 6 of the Liability Act as amended, 45 U. S. C. 56, which provides :

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

The court below thought that this provision, admittedly giving the district court in Missouri jurisdiction of the liability action concurrent with Tennessee and other courts (R. 80), was subject to no implied qualification leaving power in the Tennessee courts to prevent the respondent exporting her action to the federal court in Missouri, although it admitted, on authority of *Ex Parte Crandall* (C. C. A. 7(h), 53 F. (2d) 969, that such qualification did exist as to exporting the action to a foreign state court. (R. 83.)

It relied heavily on a number of cases which are wholly distinguishable from ours (R. 83-90), particularly relying on its own previous decision in *Chicago, M. & St. P. Ry. Co. v. Schudel*, 292 Fed. 326. (R. 86-89.)

It thought that the Tennessee injunction was not a mere *in personam* restraint on respondent within the meaning of the doctrine of *Kline v. Burke Construction Co.*, 260 U. S. 226, and *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U. S. 4, but was a direct interference with the jurisdiction of the district court in Missouri. (R. 82, 88, 89, 91.)

It thought that the jurisdiction conferred on the district court in Missouri was mandatory (R. 84), that that court had no discretion as to whether it should exercise this jurisdiction but was positively required to exercise it (R. 89, 90), and it said (R. 90):

"It would create an anomalous situation in the law if the federal court could not refuse to take the case, but that the court of the domicile could none the less prevent it from exercising effective jurisdiction."

It relied on its holding in the *Scheidel Case* (292 F. 326) on the authority of the old cases *French v. Hay*, 22 Wall. 231, and *Riggs v. Johnson County*, 6 Wall. 166, that (R. 88, 89):

"It is settled that where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court."

And on these grounds the court below concluded (R. 90):

"We think that the nature of the dual system compels the conclusion that a state court which assumes to enjoin such an action in a federal court does so in excess of its jurisdiction and renders a decree which is void in so far as it affects proceedings in the federal court. Such a void decree is not entitled to full faith and credit, and its enforcement may be enjoined."

And for these reasons and because it held that the Tennessee injunction was not an *in personam* decree, within the meaning of *Kline v. Burke Construction Co.*, 260 U. S. 226, the court below held that Section 265 of the Judicial Code did not prevent the federal district court's retorting to the Tennessee injunction by itself enjoining petitioner from further prosecuting, and commanding it to dismiss and set at naught, its Tennessee equity suit. (R. 91) The court undertook to sum up the very difficult and complex rules of comity and problems of conflict between state and federal courts (see Charles Warren, 43 Harvard Law Review 345-378) by a sententious formula which we think is obviously an over-simplification, saying (R. 91-92):

"The balance between Sections 262 and 265 of the Judicial Code lies at the point where one court interferes with the other. Neither state nor federal court has jurisdiction to enjoin the other except when one interferes with the province of the other, then the court interfered with has exclusive jurisdiction to prevent the interference. We consider this to be the effect of the code provisions as construed by the Supreme Court."

2. The reasoning and holding of the Court of Appeals for the Second Circuit in *Bryant v. Atlantic Coast Line R. Co.*

In *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569, the Court of Appeals for the Second Circuit, L. Hand, Swan, and Augustus N. Hand, Circuit Judges, Judge Learned Hand writing the opinion, reached diametrically opposite conclusions on the same questions, but in a case not so strong for the position of the railroad, because there Bryant was suing in his individual right for damages for his own personal injuries and the question of the power of the courts of appointment to contro, the official conduct of a personal representative by preventing the exportation of a suit to recover assets did not arise.

Bryant was a resident of Virginia and was injured in that state while employed by the Coast Line in interstate transportation. The witnesses lived in Virginia. It was assumed in the case that the Coast Line was also doing business in the Southern District of New York. Bryant sued under the Liability Act in the federal district court for the Southern District of New York. The Coast Line then sued Bryant in the Virginia equity court and procured an injunction restraining him from further proceeding in the action in New York, on the grounds that it was oppressive, inconvenient, vexatious and harassing. Bryant then moved the district court in New York for an injunction to restrain the Coast Line from taking any steps to enforce the Virginia injunction or to further prosecute the Virginia suit. The motion was denied. The Court of Appeals affirmed on the ground that such federal court injunction to stay the proceedings in the Virginia court was forbidden by Section 265 of the Judicial Code.

There, as here, the plaintiff in the liability action asserted that the jurisdiction and venue provision of the Liability Act gave him "the absolute privilege to sue the defendant in any district court where it did business, regardless of whatever burden this might impose upon interstate com-

merce. In all those decisions which hold the contrary, he asserts, the action enjoined was in a state court, on which jurisdiction had been conferred only permissively. Not so in the case of a federal court. Hence the decree of the Virginia court sought in substance to deprive the federal court of a jurisdiction expressly granted by Congress, and it was not only permissible, but necessary, for that court to protect that jurisdiction." (92 F. (2d) 570.) After thus stating the plaintiff's contentions, the court said:

"We think, however, that even, though all this were true, the order below was right, because the situation was within section 379 of title 28, U. S. Code, 28 U. S. C. A., sec. 379 (Rev. St. sec. 720, now Jud. Code sec. 265). That this section covers the situation literally admits of no debate; the only question is whether it falls within any of the exceptions which have come to be engrafted upon it."

Laying aside the express bankruptcy exception, the court then carefully reviewed and analyzed the exceptions which have been judicially "engrafted" upon Section 265, which it found to be as follows:

1. That a federal court which has assumed custody of a *res* may protect that custody by injunction against interference by a state court proceeding, *Farmers' Loan & T. Co. v. Lake Street F. R. Co.*, 177 U. S. 51; *Adelbert College v. Wabash R. Co.*, 215 U. S. 598.¹ Compare *General Baking Co. v. Harr*, 300 U. S. 433, holding that even in that situation the federal court may not enjoin suits in the state courts to declare the rights of claimants to the *res*, if they do not and cannot disturb its custody.²

2. The cognate exception under which a federal court may enjoin suits to seize, or relitigate the title of a purchaser to,

¹ Other cases which might be cited to this exception are: *Moran v. Sturges*, 153 U. S. 256; *White v. Schloerb*, 178 U. S. 542; *Penn. Co. v. Pennsylvania*, 294 U. S. 189.

² Another case which might be cited to this qualification is *Rickle v. Margolies*, 279 U. S. 218.

property bought under its own decree. *Julian v. Central Trust Co.*, 193 U. S. 93;¹ cf. *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 198 U. S. 188.

3. A federal court may enjoin the execution of a judgment which is being attacked for fraud in a suit pending before it, *Marshall v. Holmes*, 141 U. S. 589; *Simon v. Southern Ry. Co.*, 236 U. S. 115;² *Wells Fargo & Co. v. Taylor*, 254 U. S. 175.

4. The exception of jurisdiction to enjoin criminal prosecutions under an unconstitutional statute, *Ex Parte Young*, 209 U. S. 123, was mentioned as "too far afield to need discussion."

5. The "nearer situation,"³ the recognized exception to Section 265 that, when a suit is lawfully removed from a state court under the removal statutes, the federal court may enjoin further proceedings in the state court from which the case has been removed. *French v. Hay*, 22 Wall. 238; *Dictzsch v. Huidekoper*, 103 U. S. 494; *National Steamship Co. v. Tugman*, 106 U. S. 118; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Chesapeake & Ohio R. Co. v. McDonald*, 214 U. S. 191; *Anderson v. United Realty Co.*, 222 U. S. 164.³

As to this exception to Section 265, the court pointed out, on authority of cases just above cited, that the removal

¹ See also, as within this exception, *Gunter v. Atlantic Coast Line*, 200 U. S. 273.

² In *Simon v. Southern Ry. Co.*, the decision went on the ground of want of jurisdiction of the state court, rather than on the ground of fraud. But both fraud and want of jurisdiction are recognized exceptions to the general rule against collateral attack on judgments.

And it is further to be noted in this connection that this exception does not cover the case of a federal district court enjoining, on the ground of want of jurisdiction because service of process was void, a suit in a state court which has not yet gone to final judgment. *Essanay Film Co. v. Kane*, 258 U. S. 358, distinguishing *Simon v. Southern Ry. Co.*, 236 U. S. 115, on this ground.

³ See also *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207.

statute expressly forbids the state court to proceed further after removal, which has been construed to mean that the state court, after removal, actually loses jurisdiction, so that its decrees are *brutum fulmen*. "To enjoin further proceedings," it said, "is therefore not strictly to enjoin an action in the state court, for the action has passed to the federal court. * * * " (p. 571.)

Then the court distinguished the situation at bar from the situation in the removal cases, saying:

"The situation here is quite different; for even if the Virginia court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction." (p. 571.)

Accordingly the court in the *Bryant* case held that the case came within none of the five implied exceptions to the prohibition of Section 265 of the Judicial Code which have been judicially "engrafted" upon that statute, a statute which dates from 1793.

The court then elaborately considered the case of *Chicago, M. & St. Paul Ry. Co. v. Schendel*, (C. C. A. 8th) 292 Fed. 326, upon which the court of appeals below so strongly relied in our case, and disagreed with its conclusions. The court for the Second Circuit thought that the court for the Eighth Circuit, in the *Schendel Case*, had too broadly laid down the proposition that where the federal court has first acquired jurisdiction of the subject-matter of the cause of action it may protect its jurisdiction by injunction restraining conflicting proceedings in state courts, notwithstanding Section 265, and had failed to observe the doctrine of *Kline v. Burke Construction Co.*, 260 U. S. 226, which limits that proposition to cases where the first-acquired jurisdiction of the federal court is *in rem* or *quasi in rem*. We quoted this part of the opinion in the *Bryant Case* in our Brief in Support of the Petition. (pp. 11-12.)

3. The Federal Employers' Liability Act does not deny or take away the jurisdiction of the Court of the state of appointment to restrain a personal representative from exporting a death action to a distant Federal District Court.

There is absolutely nothing in the Federal Employers' Liability Act which expresses any intention of Congress to deny or take away from the state courts the power or jurisdiction which the Tennessee court here exercised. In this respect the Act is entirely different from the Removal Act which, as pointed out in the *Ergant Case*, expressly provides that, upon the filing of proper petition and bond for removal, "It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit." 28 U. S. C. 72.

If the state court, after proper removal, undertakes to proceed further in such suit, it does so in violation of this mandatory provision of the removal statute. And it is on this ground that this Court has based the removal exception to the prohibition of Section 265 of the Judicial Code, *National Steamship Co. v. Tugman*, 106 U. S. 118, 122; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Anderson v. United Realty Co.*, 222 U. S. 164.

Nothing corresponding to that provision of the Removal Act is to be found in the Liability Act. It does nothing more than confer jurisdiction on the federal district courts concurrently with the state courts. It even expresses an intention of Congress to prefer the state court jurisdiction, because it expressly provides that no case brought under the Act in any state court of competent jurisdiction shall be removed to any court of the United States. Thus, far from being analogous to the Removal Act, the Liability Act itself takes its cases out from under the operation of the Removal Act. Congress itself expressly distinguished the two situations.

So it is solely upon the mere fact that Congress conferred Liability Act jurisdiction on the federal district courts, con-

currently with the state courts, although expressly preferring the state court jurisdiction, that it can be argued that the Liability Act takes away from the courts of the state of appointment the ordinary power to prevent a personal representative from exporting to a foreign jurisdiction a suit which he can bring solely in his representative capacity as an appointee under state law and under authority of state courts.

But the argument proves too much and leads to an absurdity. If the mere fact that a federal court has jurisdiction of parties and subject-matter of an *in personam* action, concurrently with state courts, takes the case out of Judicial Code Sec. 265, takes away from the state court the power to entertain suits which may practically conflict with the jurisdiction of the federal court, and authorizes federal injunction to stay such state court proceedings, then there is left no room for the application of the prohibition of Section 265. A federal court can never act at all unless it has jurisdiction under an Act of Congress. If the mere existence of federal jurisdiction alone takes the case out of Section 265, then every case which could fall within the prohibition of that Section by that fact falls without the prohibition.

The judicial exceptions which have been "engrafted" on Section 265 certainly go to no such point.

Before it can be held that the Liability Act, by merely conferring concurrent jurisdiction on the federal district^{court} in the district "in which the defendant shall be doing business," has deprived the state court of the residence and appointment of the very vital power of control over the state officer, which we have shown otherwise exists, it must be found that the Act clearly manifests such intention. No such intention is manifested.

The pertinent rule of construction was stated in *Maurer v. Hamilton*, 309 U. S. 598, 614, thus:

"As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

And the same general principle was stated in *Reid v. Colorado*, 187 U. S. 137, 148, where it was said:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Simont v. Davenport*, 22 How. 227, 243."

It is to be observed that the jurisdiction and venue provision of the Liability Act does not even in terms purport to confer jurisdiction on the federal district court in *any* district in which the defendant is doing business. The provision is peculiar. It is:

"Under this chapter an action may be brought in a district court of the United States, in *the* district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business² at the time of commencing such action." (Italics ours.)

That provision reads as if it gave the plaintiff the election to sue in either of three districts. Courts can hardly change the last clause to make it read "or in *any* district in which the defendant shall be doing business at the time of commencing such action." It is hardly a necessary construction of the provision that it intended to leave to a state administrator an uncontrollable election to sue either in his state court or in the federal district of the residence of the carrier, or in the district in which the death occurred, or in any of the many districts in which a carrier like petitioner does business.

But however that may be, it is quite a different matter to construe that provision as taking away from the state and its courts all power to control its own appointee, a state

official, administering upon an estate located in the state, and to restrain exportation of the cause of action to a distant jurisdiction, pursuant to a *state* policy, or pursuant to a *state* conception of equity and good conscience. Such a construction is not "clearly indicated by those considerations which are persuasive of the statutory purpose."

The purpose of the Liability Act was to establish a uniform rule of liability and to create a federal, and hence a uniform, remedy not for all interstate carrier employee casualties but for only a limited part of the whole and *quoad hoc* to exclude application of varying state rules of liability. *New York Central R. Co. v. Winfield*, 244 U. S. 147. The dissenters in that case, Justices Brandeis and Clarke, even thought that there was no inconsistency between the Act and the application of state Workmen's Compensation Acts and recognized the wisdom of leaving such matters to local rule, in view of "the great diversity of conditions in the different sections of the United States." And Mr. Justice Brandeis there further said (p. 168), "The field of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare."

But taking the majority opinion as the true rule, the only purpose of the jurisdiction and venue provision of the Act was to insure the uniformity which the Court holds it was the purpose of the Act to accomplish. If suits are brought in state courts, the uniformity is assured by the review by this Court on certiorari which has been so often exercised. If suit is brought instead in a federal district court, it will apply the uniform federal rule, or the Court of Appeals will, or this Court will on certiorari.

But every purpose of uniformity is protected when the Tennessee administratrix is free to elect between state and federal courts in the state of her residence or appointment. It in no wise contributes to the purpose of uniformity to leave her free to go to Missouri to sue in the district court there, where she is free from all control of the Tennessee probate court and may elect never to return to that control.

It is not within the considerations persuasive of the statutory purpose to hold that the Act takes away from the courts of Tennessee all power to prevent her exporting her cause of action to such foreign jurisdiction. The only purpose of allowing suit in any district where the defendant is doing business, if that be the effect of the provision, is for the convenience of plaintiff in making service of process easy. The easiest place for respondent here to serve petitioner was in her own State of Tennessee. When she elected rather to go to Missouri to sue, she adopted a more inconvenient course, and obviously did so for the purpose of putting petitioner to inconvenience, vexation, harassment and prejudice.

Since it was held in *Eric R. Co. v. Tompkins*, 304 U. S. 64, not only that the decisions of state courts on matters of general or unwritten law are controlling and binding on federal courts, but also that it would have been beyond the power of Congress under the Constitution to supplant state control of such matters or to give the federal courts control thereof, we think it would raise grave question as to the constitutionality of the Federal Employers' Liability Act if it be construed to deny to the courts of Tennessee the power and jurisdiction to control the respondent as a Tennessee administratrix under the facts in this case and to restrain her as she was restrained, from exporting her cause of action, her sole Tennessee asset, from Tennessee to Missouri. A construction which raises such doubts will of course be avoided.

It will be remembered that while the Liability Act created a cause of action for wrongful death which did not exist at common law, although it had been created in most states by statutes patterned on Lord Campbell's Act, yet the Liability Act did not create any federal office or appoint or provide for the appointment of any federal officer to enforce that right, as conceivably it might have done. Congress was content to vest the cause of action in the "personal representative" (45 U. S. C. 51), a state officer, appointed by

state courts, to administer assets within the state, and subject to the control of state courts.

We think the Act cannot be validly construed as intending to take away from the state courts the very important part of that control here involved.

4. **The rule of comity or of protection of first-acquired jurisdiction does not take away from the State Court the power to enjoin, and does not warrant the Federal Court injunction and, conversely, the federal injunction violates Section 265 of the Judicial Code.**

Since the Liability Act does not take away from the Tennessee equity court the jurisdiction and power which it exercised, it only remains to examine whether the rule of comity between courts, or the rule of protection of first acquired jurisdiction, takes the power away from the state court, or takes the case out of the prohibition of Section 265 and warrants the federal court in enjoining and setting at naught the proceeding in the state court.

This is really only another facet of the same problem as presented by the argument based on the Liability Act, since the argument that the rule of comity takes the power to enjoin away from the Tennessee court and gives the power to enjoin to the district court in Missouri, in spite of Section 265, also is based entirely on the fact that the district court in Missouri had jurisdiction, *in personam* jurisdiction, of the liability action.

Here again, the theory of the court below proves too much. For if the mere fact of the existence of such jurisdiction is sufficient to take the case out of the prohibition of Section 265 then every case in which a federal court can act at all is taken out of the prohibition.

The article by Charles Warren, "Federal and State Court Interference," 43 Harvard Law Review 345-378 (January, 1930), cited in the opinion in *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4, 9, is an interesting review of the general problem and of the trends of decision.

Beginning with *Diggs v. Wolcott*, 4 Cranch 179, in 1807, and on down to the Civil War period in such cases as *Peck v. Jenness*, 7 How. 612, and *Orton v. Smith*, 18 How. 263, the principle that federal courts cannot enjoin proceedings in the state courts was applied in literal strictness, sometimes expressly invoking the Act of March 2, 1793 (1 Stat. 334), now Section 265, sometimes *sub silentio*.

It was not until after the Civil War and in the period of great expansion of federal power as against states' rights that the judicial exceptions began to be "engrafted" on Section 265. Curiously enough, this process started first in the now repudiated "county bond cases," *Gelpcke v. Dubuque*, 1 Wall. 175, *Riggs v. Johnson County*, 6 Wall. 166, and *Weber v. Lee County*, 6 Wall. 210, in which it was held that the federal courts could substitute their own judgment for the judgment of the highest courts of the states on the question of the validity, under state constitutions and laws, of county and municipal bond issues. We say that those cases are "repudiated" now because they are wholly inconsistent with *Eric R. Co. v. Tompkins*, 304 U. S. 64, and because of the approving references in the opinion in the *Tompkins* case to Mr. Justice Miller's dissenting opinions in the county bond cases.

The article by Warren, written prior to 1930, already noted a then recent tendency of decisions to put brakes on the federal district courts and to limit the judicial exceptions to Section 265. That trend has continued since.

We submit that the analysis by the Court of Appeals for the Second Circuit, in *Bryant v. Atlantic Coast Line R. Co.*, of the judicial exceptions "engrafted" on Section 265 hereinabove reviewed is sound and cogently demonstrates that the federal injunction in the present case does not come within any of those exceptions.

And we think the Court of Appeals for the Eighth Circuit, in the opinion here under review, was unsound when it held that the jurisdiction given by the Liability Act to the district court in Missouri is mandatory, that the court had no discretion but to exercise it, that such jurisdiction

took away from the Tennessee court all power and jurisdiction to restrain the respondent from further prosecuting her liability action in the district court in Missouri, and that, therefore, the Tennessee injunction was void and entitled to no faith and credit and might be retorted to by federal injunction.

It certainly is not necessarily or universally true, as the court below held, that such jurisdiction given to a federal district court is mandatory and must be exercised, regardless of conflict with state courts.

In *Canada Malting Co. v. Paterson Co.*, 285 U. S. 413, it was held that an admiralty court, although it had jurisdiction of a suit between Canadians, properly exercised a discretion not to exercise the jurisdiction, in view of the pendency in the admiralty court of Canada of suits to determine liability between the parties. And that this principle is not confined to admiralty jurisdiction is clear from the following statement by this Court (422-423):

“Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigations can more appropriately be conducted in a foreign tribunal.”

In our case the action in the district court in Missouri was between non-residents of Missouri. Obviously the litigation could more conveniently and appropriately be conducted in the Tennessee courts or in the federal district court in Tennessee, where all the witnesses live. No reason is seen why it would not have been a proper exercise of discretion for the district court in Missouri to decline to exercise jurisdiction, especially when faced with the fact that the Tennessee court had enjoined respondent, a Tennessee administratrix, from further proceeding in Missouri, on its own conception of equity.

The same principle of discretion to yield up and refuse to exercise federal jurisdiction to avoid conflict with state courts was given direct application by this Court in *Penn Co. v. Pennsylvania*, 294 U. S. 189. There was involved an actual race between the federal district court in Pennsylvania and the court of that state for jurisdiction and possession of the property and business of a Pennsylvania insurance company. Both courts appointed receivers and ordered the company to turn over its property and business to the respective receivers. That was a case of *in rem* conflict and hence clearly within the exception to Section 265 that in case of *in rem* conflict the court which first acquires jurisdiction of the *res* may protect its jurisdiction by injunction. The federal court in that case first acquired jurisdiction. Both courts enjoined the company. The company was in a dilemma and the courts were at an impasse.

There was no attempt at collateral attack on either court's decree but an orderly, direct review of the state court's decree. This Court resolved the dilemma and avoided the impasse by holding that since the federal court had first acquired jurisdiction *in rem*, the rule of comity took away from the state court the power or jurisdiction to interfere with that jurisdiction. It expressly distinguished that situation from a case of mere *in personam* conflict, where the court first acquiring jurisdiction does not have exclusive jurisdiction or the power to exclude the second court, on an authority of *Buck v. Colbath*, 3 Wall. 334, and *Kline v. Burke Construction Co.*, 260 U. S. 226.

Therefore this Court reversed the decree of the Pennsylvania court but with what amounted to a plain suggestion to the federal district court that it relinquish its jurisdiction in favor of the state court. This Court (p. 198) pointed out that, although the decree of the state court could not competently interfere with the prior-acquired jurisdiction *in rem* of the federal district court, yet "it did confer on the Commissioner the requisite authority to ask the district court to relinquish its jurisdiction in favor of the state ad-

ministration." And, in reversing the state court, this Court said (p. 199):

"The decree must accordingly be reversed and the cause remanded for further proceedings not inconsistent with this opinion, but without prejudice to an application by the Commissioner to the district court for an order relinquishing its jurisdiction over the property of the company and vacating its injunction against surrender of it to the Commissioner for liquidation under the Insurance Department Law of the state. See No. 394, *Pennsylvania v. Williams*, *supra*."

In the case referred to, *Pennsylvania v. Williams*, 294 U. S. 176, practically the same situation as to *in rem* conflict between the federal district court in Pennsylvania and state officers acting under the banking laws of Pennsylvania was involved. There the review by this Court was of the action of the federal district court. And, although it held that the district court had prior *in rem* jurisdiction, yet it reversed the district court, directed it to relinquish jurisdiction in favor of the state officers and to take no further exercise of jurisdiction except to discharge the federal receivers and settle their accounts. This was done on authority of *Harkin v. Brundage*, 276 U. S. 36.

The same principle was applied in *Harkin v. Brundage*, *supra*, where the federal court first acquired *in rem* jurisdiction but the state court was prevented from first acquiring such *in rem* jurisdiction by a fraud upon the state court, which this Court held under the circumstances to amount to a fraud on both courts. This Court held that the federal district court had jurisdiction, first acquired and *in rem*, but that in view of the fraud on the state court the federal court, in addition to punishing those guilty of the fraud, was required by "forbearance and comity" to surrender jurisdiction and possession of the *res* to the state court.

Those were all cases where the conflict between courts was *in rem*, where the federal courts had first acquired *in rem* jurisdiction and, hence, under the settled rule of comity and exception to Section 265 of the Judicial Code, had tech-

nical power and jurisdiction to exclude the state courts even by injunction, yet in all of them this Court held that the federal courts should have exercised discretion to relinquish jurisdiction in favor of state courts and officers.

We think it *a fortiori* true that in a case like ours, where the conflict is only *in personam* and not *in rem*, the federal court in Missouri had discretion to refuse to exercise its purely *in personam* jurisdiction, when faced with the Tennessee injunction restraining respondent from further proceeding in its jurisdiction. We think it obvious that the court below was wrong in holding that merely because the district court in Missouri had technical jurisdiction under the Liability Act it was mandatorily required to exercise it at all events and had no discretion to refuse to do so.

But our case is even stronger than that. For the district court in Missouri went further than merely refusing to decline to exercise jurisdiction or to relinquish it in favor of other courts. It summarily enjoined further proceedings in the Tennessee court and ordered petitioner to dismiss that proceeding and set it at naught. And the Court of Appeals below affirmed on the theory not only that the district court had jurisdiction but that, having jurisdiction, its jurisdiction was exclusive of all power in the state court so as to make the state court injunction void, and that the district court was mandatorily required to exercise its jurisdiction and to protect it by its own injunction, regardless of Section 265 of the Judicial Code.

In the very recent case of *Railroad Commission of Texas v. The Pullman Company*, 312 U. S. 496, 500-501, decided March 3, 1941, this Court gave effect to and a clear statement of the doctrine whereby federal courts will abstain from exercise of jurisdiction to avoid conflicts with state courts. It was there said:

"An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the exercise of the sound discretion which guides the determination of courts of equity." *Beal v. Missouri Pacific R. R.*, No. 72, decided January 20, 1941. The history of equity

jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as varied applications of this supple principle as the situations that have brought it into play. See, for modern instances, *Beasley v. Texas & Pacific Ry.*, 191 U. S. 492; *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334; *United States v. Dern*, 289 U. S. 352. Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner v. Boykin*, 271 U. S. 240; *Spelman Motor Co. v. Dodge*, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania v. Williams*, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist v. Interborough Co.*, 279 U. S. 159; cf. *Hawks v. Hamill*, 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. See *Cavanaugh v. Looney*, 248 U. S. 453, 457; *Di Gioranni v. Camden Ins. Assn.*, 296 U. S. 64, 73. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013; Judicial Code, § 24(1), as amended, 28 U. S. C. § 41(1); 47 Stat. 70, 29 U. S. C. §§ 191-15."

And that the prohibition of Section 265 of the Judicial Code must be scrupulously applied, was indicated in the later case of *Shamrock Oil & Gas Corp. v. Sheets*, 85 L. ed. (Adv.) 836, 840, decided April 28, 1941, where it was said:

"Not only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved

to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined'. *Healy v. Ratta*, 292 U. S. 263, 270; see *Kline v. Burke Construction Co.*, 260 U. S. 226, 233, 234; *Matthews v. Rogers*, 284 U. S. 521, 525; cf. *Elgin v. Marshall*, 106 U. S. 578."



It seems clear that when respondent, by the supplementary proceedings in the liability action, appealed to the district court as a chancellor to enjoin the enforcement of the state court injunction, a situation was presented within this principle of abstention and in which the district court had certainly a discretion not to issue the injunction, if indeed it be assumed that he had any power to issue the injunction in view of Section 265, and we think we have shown that he had no such power. But the Court of Appeals below held that the district court was without discretion to refuse to exercise jurisdiction in the liability action and was mandatorily required to protect that jurisdiction by injunction, although that jurisdiction was purely *in personam*.

Decisions of this Court not only do not support the holding below; they conclusively show, as we read them, that the holding was wrong. The court below expanded, far beyond the limitations this Court has put upon it, the exception to the prohibition of Section 265 growing out of the rule of comity between courts, whereby the court which first acquires jurisdiction may, in some cases, protect its jurisdiction by injunction against conflicting proceedings in the other court.

It is clear that the rule of comity itself, the exclusiveness of first-acquired jurisdiction, and hence the power to protect first-acquired jurisdiction against conflicting proceedings in other courts of coordinate and concurrent jurisdiction, is confined to cases where the first-acquired jurisdiction is *in*

rem or *quasi in rem*. *Kline v. Burke Construction Co.*, 260 U. S. 226; *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 88; *Richle v. Margolies*, 279 U. S. 218; *Penn Co. v. Pennsylvania*, 294 U. S. 189, 195; *Princess Lida v. Thompson*, 305 U. S. 456, 465; *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377.

And that that doctrine is so limited to protection of jurisdiction *in rem* or *quasi in rem* and does not extend to protection of purely *in personam* jurisdiction, when it is a federal court which is undertaking to protect its jurisdiction against conflicting proceedings in state courts, is true *a fortiori* by reason of the very prohibition of Section 265 itself, a prohibition which has existed since 1793 and which Mr. Justice Brandeis referred to, in his dissent in the famous and now obsolete case of *Truax v. Corrigan*, 257 U. S. 312, 376, as a statutory denial of the preventive remedy of injunction "because of a public interest deemed paramount." See also *Oklahoma Packing Co. v. Oklahoma Gas Co.*, 309 U. S. 4, 8-9, where Section 265 was referred to as "a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts."

It is to be noted that there is no such statutory limitation of the power of state courts to issue injunctions and that such limitation as exists depends solely on the judicial doctrine of comity. But both the doctrine of comity and the express statutory denial limit the injunctive power of the federal courts.

The court below in our case, although it discussed *Kline v. Burke Construction Co.*, 260 U. S. 226 (R. 90-91), failed to give effect to the very distinction between *in rem* and *in personam* jurisdiction drawn in that case, and it overlooked the clear limitation on the doctrine whereby the court first acquiring jurisdiction may protect its jurisdiction by injunction, which limits that right to protection of jurisdiction *in rem* or *quasi in rem*.

Nothing can be plainer than the fact that the district court in Missouri had no jurisdiction *in rem* or *quasi in rem*. Its

only jurisdiction was purely *in personam*, of an action *in personam* for money damages for wrongful death. The protection of that kind of jurisdiction by injunction to stay proceedings in a state court is not within any exception which has been engrafted on Section 265.

The court below, we think, gave expression to a very queer confusion of thought in this connection. It did not assert that the federal district court had anything other than *in personam* jurisdiction or that it was protecting any first-acquired jurisdiction *in rem* or *quasi in rem*. Indeed it noted the very distinction drawn in *Kline v. Burke Construction Co.* What it did hold was that the *Tennessee injunction suit* was not an *in personam* action within the meaning of that distinction, and for that reason held that Section 265 did not apply.

It commented on the discussion of its opinion in the *Schendel Case* by the Court of Appeals for the Second Circuit in *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569, pointing out that that court thought the court below had misconstrued *Kline v. Burke Construction Co.* in the *Schendel Case*, and said (R. 91):

"It appears to have been the view of the Second Circuit that since the state injunction suit was in personam and the federal damage suit and the proceedings ancillary thereto were also in personam, they were suits that could proceed simultaneously and *pari passu*. * * * But an action for injunction is not an *in personam* action of this nature, and interference by one court or the other with the trial of such actions is the very thing which the opinion in the *Kline case* seems intended to prevent."

Thus the court below seems to have thought that the Tennessee injunction restraining respondent personally was not truly an *in personam* judgment but was something in the nature of a proceeding *quasi in rem*.

It overlooked the fact that if that were so, then it was the state court of Tennessee which first acquired jurisdiction *quasi in rem*. In that case, under the doctrine of the cases

hereinbefore cited, the state court therefore had the power to protect its jurisdiction against conflicting proceedings in the federal court. From its view that the state court proceeding was not *in personam* the court below drew the logically inverted conclusion that therefore the federal court could enjoin the state court proceeding in spite of Section 265.

We think it quite clear, however, that an injunction against the person is an exercise of purely *in personam* jurisdiction. It is equally clear that the federal court in Missouri had nothing but purely *in personam* jurisdiction. The conflict between courts was solely a conflict between their respective *in personam* jurisdictions. This being the case, the mere fact that jurisdiction was first acquired by the federal court in Missouri did not, under the rule of comity, take away or destroy the jurisdiction of the Tennessee court, or render its judgment void, or take the case out of the prohibition of Section 265 and authorize the district court to retort by enjoining the proceeding in the Tennessee court.

Where there is no statutory denial of the right to enjoin proceedings in another court, as where a state court enjoins parties before it from proceeding in federal courts or in other state courts, or where one federal district court enjoins parties before it from proceeding in another federal district court, the personal restraint on the parties against proceeding in the other court is not a direct interference with the other court and is not contrary to any rule of comity between courts. *Steelman v. All Continent Corp.*, 301 U. S. 278, 291, and cases cited.

Thus the Tennessee injunction was no direct interference with the federal court in Missouri. It was solely a personal restraint on respondent. No rule of comity forbade it or empowered the district court to retort by counter injunction. The Tennessee injunction was squarely within the doctrine of the *Steelman* case. The Tennessee court did not challenge the jurisdiction of the federal court in Missouri, "if the word jurisdiction be taken in its strict and

proper sense." (301 U. S. at 290.) Petitioner, in the Tennessee suit, sought "an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong." (301 U. S. at 291.)

But where the remedy of injunction is expressly denied by statute, as by Section 265 of the Judicial Code, where a federal court attempts to stay proceedings in the state court by restraining the parties from further proceeding, the fact that the restraint does not actually run to the state court itself but only to the parties does not take the injunction out of the prohibition of the statute. Clearly Section 265 forbids federal courts from restraining parties from further proceedings in suits in the state courts. *Diggs v. Walcott*, 4 Cranch 179; *Peck v. Jenness*, 7 How. 612; *Orton v. Smith*, 18 How. 263; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340; *Lawrence v. Morgan's Railroad, etc., Co.*, 121 U. S. 634; *In re Chetwood*, 165 U. S. 443; *United States v. Parkhurst-Davis Mercantile Co.*, 176 U. S. 317; *Essanay Film Co. v. Kane*, 258 U. S. 358; *Kline v. Burke Construction Co.*, 260 U. S. 226; *Kohn v. Central Distributing Co.*, 306 U. S. 531; *Oklahoma Packing Co. v. Oklahoma Gas Co.*, 309 U. S. 4; *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 274.

All those cases involved federal injunction merely restraining the parties from proceeding in state court suits but all held that Section 265, or its predecessor statutes, denied the injunction power to the federal courts.

It follows from all the foregoing that the Tennessee court was not without jurisdiction and its injunction was not void; that the district court below should have given it full faith and credit; that the injunction by the district court, restraining petitioner from enforcing the Tennessee injunction and commanding it to dismiss the Tennessee equity suit and set it at naught, was a violation of Section 265, and was not within any of the judicial exceptions that have been "engrafted" on that section.

IV.

**Even if the Tennessee Injunction Decree was Erroneous,
the Federal District Court Could Not Entertain a Col-
lateral Attack Upon It and Treat It as Absolutely Void.**

The Tennessee court had jurisdiction by personal service of respondent, a Tennessee resident. Even if its injunction was erroneous, as a violation of some rule of comity between courts, it could only be corrected on a direct review. It was not absolutely void for want of jurisdiction and hence subject to collateral attack. If the legality of the Tennessee court's action was to be questioned, it could have been done only by laying the proper foundation through appropriate proceedings in that court, and then by appellate proceedings. The Tennessee injunction could not be collaterally attacked in the federal court. Nor could it be ignored. *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 89-90.

But respondent took no appeal from the Tennessee injunction. She attacked it collaterally in the district court. And that court entertained the collateral attack and undertook to set the Tennessee decree aside as void. This was plainly error and a denial of required full faith and credit. Article IV, section 1, Constitution of the United States; 1 Stat. 122, as amended, 28 U. S. C. 687.

CONCLUSION.

Upon all the foregoing, we submit that the decision below should be reversed.

Respectfully submitted,

H. O'B. COOPER,
RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
ERVIN C. HARTMAN,
SIDNEY S. ALDERMAN,

S. R. PRINCE,
Of Counsel.

*Attorneys for Petitioner,
Southern Railway Company.*